

Guaranties Under the Uniform Fraudulent Transfer Act, 9 Cardozo L. Rev. 685 (1987); Steven L. Schwarcz, *The Impact of Fraudulent Conveyance Law on Future Advances Supported by Upstream Guaranties and Security Interests*, 9 Cardozo L. Rev. 729 (1987); Brad R. Godshall & Robert A. Klyman, *Wading "Upstream" in Leveraged Transactions: Traditional Guarantees v. "Net Worth" Guarantees*, 46 Bus. Law. 391 (1991). Indeed, the dubious value of upstream guarantees in bankruptcy derives in part from the unquestioned availability of substantive consolidation on the basis of debtor wrongdoing that creditors have little ability to prevent. Since neither the Third Circuit nor the Banks call for total abolition of substantive consolidation, a world in which upstream guarantees are sacrosanct, even in bankruptcy, is not in the offing even in the event of an affirmation here.

Third, whatever else may be said about the rationale for the Third Circuit's approach to substantive consolidation, that approach – as well as the approach of the Banks – accords little recognition to the existence (much less the legitimate interests) of any other creditors on the facts of this case. While they acknowledge the equitable nature of substantive consolidation, there is hardly a word in the Banks' Opposition or in the Third Circuit's opinion about the thousands of involuntary creditors of OCD and its subsidiaries – future asbestos claimants – who never had an opportunity to finely structure any OCD transaction in order to protect their interests. A fair analysis of the Third Circuit's test will recognize that it gives short shrift to the interests of tort victims, trade creditors, and other creditors, while elevating the interests of lenders – yet another reason why review by this Court is warranted.



CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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